(1)

91-124

Supreme Court, U.S.
FILED
JUL 22 1991
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

RONALD FRANCIS SWOYER,

Petitioner

Versus

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Richard J. Orloski
Attorney for Petitioner
ORLOSKI & HINGA
1005 South Cedar Crest Blvd.
Allentown, PA 18103
(215) 433-2363
ID# 09857

QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT THE SUPREME COURT OF PENNSYLVANIA ERRED AS A MATTER OF LAW IN UPHOLDING THE TRIAL COURT WHERE THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO FIND A VIOLATION OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION BY DENYING PETITIONER'S REASONABLE REQUEST FOR CONTINUANCE AND DISMISSING PETITIONER'S APPEAL WITHOUT A HEARING BECAUSE PETITIONER'S ATTORNEY WAS REQUIRED TO APPEAR IN FEDERAL COURT WHEN THE RESPONDENT'S ATTORNEY DID NOT OPPOSE THE CONTINUANCE AN NO PREJUDICE WOULD HAVE RESULTED FROM A CONTINUANCE?

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

RONALD FRANCIS SWOYER,

Petitioner

Versus

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Ronald Francis Swoyer, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, Eastern District.

OPINIONS BELOW

The Order of the Pennsylvania Supreme Court rendered May 2, 1991 is unrecorded and appears at page 17 of the Appendix.

The Order of Commonwealth Court of Pennsylvania rendered 11/9/90 is unrecorded and appears at page 19 of the Appendix.

The Order and Opinion of Commonwealth

Court of Pennsylvania rendered 9/10/90 is unrecorded and appears at page 20 of the Appendix.

The Order and Opinion of Lehigh County Court of Common Pleas rendered 10/5/89 is unrecorded and appears at page 35 of the Appendix.

The Final Order of the Supreme Court of Pennsylvania was dated May 2, 1991 and this Petition for Writ of Certiorari was timely filed within ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. Section 1254(1) and Rule 17 of this Honorable Court.

FEDERAL PROVISION INVOLVED

The Supremacy Clause, Article VI, Section 2 of the United States Constitution.

STATEMENT OF THE CASE

Petitioner, Ronald Francis Swoyer, appealed to the Court of Common Pleas of Lehigh County, Pennsylvania, concerning the Commonwealth's suspension of Petitioner's driver's license.

On or about December, 1988, Petitioner and Petitioner's attorney appeared in the Pennsylvania Court of Common Pleas for a hearing on Petitioner's appeal. At that time, the court continued the matter so that a transcript could be obtained.

Thereafter, with notice and for good cause, the matter was continued. On January 31, 1989, Petitioner's attorney was unavailable for religious reasons. On March 13, 1989, and August 9, 1989, Petitioner's attorney was in Federal Court.

On October 5, 1989, Petitioner's attorney was required to appear in Federal Court. In his place, Petitioner's attorney sent a former associate of Petitioner's

attorney's firm to request a continuance. At that time, Petitioner's attorney's firm consisted of two attorneys: Mr. Orloski, who was bound to Federal Court; and Mrs. Hinga, an associate who lives in California. Thus, no one from Petitioner's attorney's firm was available to conduct the hearing in the Court of Common Pleas of Lehigh County, Pennsylvania on October 5, 1989.

The Commonwealth's attorney did not oppose a continuance. No prejudice would have resulted to any person from a continuance of this matter. Further, Petitioner's attorney was prepared for the hearing, did not seek additional time and could have appeared at another time in the immediate future. Regardless, the trial court denied Petitioner's request for a continuance, and without a hearing, dismissed the appeal as being without merit.

Petitioner sought review by the Commonwealth Court of Pennsylvania. On September 10, 1990, Commonwealth Court upheld the dismissal of Petitioner's appeal. On November 8, 1990, Commonwealth Court of Pennsylvania denied Petitioner's application for Reargument. On may 2, 1991, the Supreme Court of Pennsylvania denied Petitioner's Petition for Allowance of Appeal. Petitioner respectfully appeals to this Honorable Court.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by Certiorari is appropriate in this case at bar under Rule 17(1)(a) of the Rules of the United States Supreme Court in that a State Supreme Court has rendered a decision in conflict with the United States Constitution so as to call for an exercise of this Honorable Court's power of supervision.

ARGUMENT

I. WHETHER OR NOT THE SUPREME COURT OF PENNSYLVANIA ERRED AS A MATTER OF LAW IN UPHOLDING THE TRIAL COURT WHERE THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO FIND A VIOLATION OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION BY DENYING PETITIONER'S REASONABLE REQUEST FOR CONTINUANCE AND DISMISSING PETITIONER'S APPEAL WITHOUT A HEARING BECAUSE PETITIONER'S ATTORNEY WAS REQUIRED TO APPEAR IN FEDERAL COURT WHEN THE RESPONDENT'S ATTORNEY DID NOT OPPOSE THE CONTINUANCE AN NO PREJUDICE WOULD HAVE RESULTED FROM A CONTINUANCE?

Generally, refusal of a continuance rests in the discretion of the court to which the application is made. This court's exercise of such discretion will not be reviewed except in clear cases of abuse. Blackman v. Comdex of Pennsylvania State Police, 62 Pa. Comdex 188, 435 A.2d 309 (1981).

1. The trial court clearly abused its discretion in the case at bar.

a) To determine whether a continuance was improperly denied, the court

must consider whether there was prejudice to the opposing party by delay, whether the opposing counsel was willing to continue the case, and length of delay requested. Krueger by Krueger v. Williams, 316 Pa. Super. 408 (1983).

Here, Petitioner appealed to the Court of Common Pleas the Respondent's suspension of Petitioner's driver's license.

In December, 1988, Petitioner and Petitioner's attorney appeared in the Court of Common Pleas for a hearing on Petitioner's appeal. At that time, the court continued the matter so that a transcript could be obtained.

Thereafter, with notice and for good cause, the matter was continued. On January 31, 1989, Petitioner's attorney was unavailable for religious reasons. On March 13, 1989 and August 9, 1989, Petitioner's attorney was in Federal Court.

On October 5, 1989, Petitioner's

attorney was required to appear in Federal Court. In his place, Petitioner's attorney sent a former associate of Petitioner's attorney's firm to request a continuance. At that time, Petitioner's attorney's firm consisted of two attorneys: Mr. Orloski, who was bound to Federal Court; and Mrs. Hinga, an associate, who resides in California. Thus, no one from Petitioner's attorney's firm was available to conduct the hearing in Pennsylvania in the Court of Common Pleas on October 5, 1989.

The Respondent's attorney did not oppose a continuance. No prejudice would have resulted to any person from a continuance of this matter, and Petitioner's attorney was prepared for the hearing and did not seek additional time, but had a conflict. Regardless, the trial court denied Petitioner's request for a continuance, and without a hearing, dismissed the appeal as being without

merit.

b. Petitioner's attorney's scheduling conflict was not so inexcusable that the Petitioner should suffer dismissal of his appeal rather than be granted a continuance. Coburn v. Domanoskye, 257 Pa. Super. 474, 398 A.2d 1335 (1978).

Considering Petitioner's attorney's reasonable explanation, the Commonwealth's lack of opposition, the absence of prejudice and the fact that Petitioner's attorney did not seek additional time, but could have appeared at another time in the immediate future, the Court erred in denying the continuance. Krupa by Krupa v. Williams, supra.

The trial court abused its discretion in refusing to grant a continuance requested by Petitioner to ensure his chosen attorney's availability. Id. Hence, the lower court orders denying the request for

continuance and dismissing Petitioner's appeal ought to be reversed and set aside.

2. The lower court's refusal to continue this matter contravenes the spirit of the Supremacy Clause to the United States Constitution. Generally, trial counsel's conflicting court commitments constitutes justifiable grounds for granting a continuance. Easelli v. Wanamaker, 326 Pa. Super. 290, 473 A.2d 1097 (1984), where, as here, trial counsels' conflicting commitment is in Federal Court, the State court ought to grant the continuance.

In the case at bar, Petitioner's attorney was bound to Federal Court. The Supremacy Clause of Article VI, Section 2, to the United states Constitution provides, inter alia, that Federal laws supersede any inconsistent State laws or rules. Logically, it follows that if an attorney is required to appear in Federal and State court simultaneously, the attorney is bound

to attend the Federal Court matter.

In refusing to grant a continuance based upon a conflicting Federal Court commitment, the trial court violated the spirit of the Supremacy Clause of the United States Constitution. The lower court orders ought to be reversed and set aside. Hence, Petitioner respectfully seeks review by this Honorable Court.

3. The trial court erred as a matter of law in dismissing Petitioner's appeal on the merits without a hearing. Petitioner's counsel respectfully acknowledges the trial court's necessity to insist that cases proceed to adjudication promptly. However, Petitioner's attorney could not avoid the scheduling conflict, as aforesaid.

For the trial court to decide against Petitioner on the merits without a hearing violates Petitioner's constitutional right to due process.

It is physically impossible for one

lawyer to be in two places at the same time. In the private practice of law, scheduling conflicts are unavoidable. There must be a clear priority in scheduling among courts, and the United States Constitution provides the answer to Pennsylvania attorneys in the Supremacy Clause:

> Supreme Court of the United States
> United States Court of Appeals,
> Third Circuit
> United States District Court
> Supreme Court of Pennsylvania
> Superior Court/Commonwealth Court
> Court of Common Pleas

See, Relations of State and Federal Courts, Wright, Miller and Cooper, Federal Practice & Procedure, Jurisdiction Section 4201 et seq. It is an undisputable fact that, even a death penalty imposed by a State court trial judge and affirmed by the highest appellate tribunal in the state can be stricken down by a Federal trial court judge hearing the case on a Federal writ of habeas corpus. In dissent, Judge Pellegrini observes as follows:

> "...Swoyer argues if counsel is required to appear in federal and state courts simultaneously, counsel is bound to attend the federal matter. While I believe that this contention is erroneous so many federal judges believe this to be true, how can it be frivolous?"

With all due respect to Judge Pellegrini, so many Federal judges believe it to be true because they are experts in the United States Constitution, the Supremacy Clause and Federal Court jurisdiction. A Federal trial judge knows that he can dislodge a state court death penalty, even though affirmed by the highest state appellate tribunal. A Federal trial judge knows that he can enjoin a State Governor from implementing a program mandated by the State legislature by finding the program unconstitutional. A Federal trial judge knows that he can enjoin a State trial judge from implementing an order merely by issuing an order enjoining all state personnel from implementing that order.

Given these powers under the Federal Constitution and Federal statutes--and given supremacy over all State officials by virtue of the Supremacy Clause--is there any wonder why so many Federal judges think that their court scheduling order preempts a State court judge's scheduling order.

The reality is that Petitioner, Ronald Swoyer, had his license suspended by a State court judge who never heard all the evidence. When the newly-discovered evidence was found, the appropriate motion was presented to the court to get the issue heard by the court.

In Pennsylvania's Lehigh County, license suspension appeals are only heard, at most, on one day a month, and probably not even that frequently. Given the limited time that Lehigh County trial judges give to license suspension cases, scheduling difficulties are inevitable. When those scheduling conflicts are with

actual Federal court appearances, it would seem obvious and indisputable that a Federal scheduling order takes precedence over the State court order.

There was no prejudice to Respondent, PennDot. Respondent did not even oppose the continuance. The only one who has been prejudiced by the denial of the continuance is the Petitioner because, even though he has newly discovered evidence, he still has not yet had a trial judge address his motion on the merits. Due process of the Fourteenth Amendment (notice and an opportunity to be heard), and the Supremacy Clause require that this appeal not be dismissed because of counsel's unavailability because of an actual appearance in Federal Court. to do so is to exalt from over substance, and to declare that State court judges can strike down Federal Court Orders. The reality in our constitutional system is just the

opposite. See, U.S. v. Composite State Board of Medical Examiners of Georgia, 656 F.2d 131 (Ga Cir, 1981); Ruiz v. Comm. Dept. of Transportation, 679 f.Supp 341, affirmed, 858 F.2d 898 (NY, Cir, 1988). The Orders of September 10, 1990 and November 8, 1990 of the lower court contravene Federal constitutional law, and must be set aside. Hence, Petitioner respectfully seeks review by this Honorable Court.

CONCLUSION

For the foregoing reasons, this Petition For a Writ of Certiorari ought to be granted.

ORLOSKI & HINGA

Richard J. Orloski
Attorney for Petitioner

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

May 6, 1991

Dear Counsel:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

'May 2, 1991 Petition Denied.

Per Curiam.'

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RONALD FRANCES SWOYER, Appellant	:	
	:	NO. 2062 C.D 1989
vs.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Appellee	:	

ORDER

NOW, November 8, 1990, having considered appellant's application for reargument, the application is denied.

BY THE COURT:

David W. Craig
P.J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RONALD FRANCIS SWOYER, Appellant	:	NO. 2062 C.D. 1989
vs.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Appellee	:	

BEFORE: HONORABLE JAMES CRUMLISH, JR., President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE SILVESTRI SILVESTRI, Senior Judge

SUBMITTED ON BRIEFS: March 30, 1990

OPINION NOT REPORTED

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RONALD FRANCIS SWOYER, Appellant	:	
	:	NO. 2062 C.D. 1989
vs.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Appellee	:	

ORDER

AND NOW, this 10th day of September, 1990, the decision of the Court of Common Pleas of Lehigh County denying continuance and dismissing the Motion for Rehearing of Appellant is hereby affirmed, and the case remanded for determination of the amount of counsel fees and costs to be awarded to Appellee, Department of Transportation.

Jurisdiction relinquished.

MEMORANDUM OPINION BY
SENIOR JUDGE SILVESTRI

FILED: Sept. 10, 1990

Ronald Francis Swoyer (Swoyer) appeals from the October 5, 1989 order of the Court of Common Pleas of Lehigh County (trial court) denying his request for a continuance and dismissing his Motion for Rehearing on Grounds of Newly Discovered Evidence (Motion for Rehearing) of his appeal from an order of the Department of Transportation (Department) suspending his operating privileges.

The events giving rise to the present appeal are as follows. Swoyer's operating privileges were suspended by the Department for one year for his refusal to submit to chemical testing pursuant to Section 1547 of the Vehicle Code.[1]

1.Section 1547(b) of the Vehicle Code, 75 Pa. C.S. Section 1547(b), in pertinent part provides:

(b) Suspension for refusal.--

On or about October 7, 1987, Swoyer appealed the order suspending his operating privileges to the trial court. A hearing was held on January 15, 1988 at which the trial court determined that Swoyer had refused to take the breathalyzer and issued an order, on the same date, denying his license suspension appeal. Swoyer never filed an appeal from the January 15, 1988 order of the trial court.

Subsequently, on December 23, 1989, new counsel for Swoyer filed a Motion for Rehearing of his appeal based upon newly discovered evidence. The newly

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...Continued...

> (1) If any person placed under arrest for a violation of Section 3731 (relating to driving under influence of alcohol or controlled substance) is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person for a period of 12 months.

discovered evidence involved a discrepancy between testimony of the breathalyzer operator at the license suspension hearing and the criminal trial on drunk driving at which Swoyer was found not guilty. The trial court ordered a hearing on Swoyer's December 23, 1988 Motion for Rehearing based upon this newly discovered evidence. The hearing was scheduled for January 31, 1989.

By order of the trial court dated October 5, 1989, Swoyer's fourth request for a continuance of the hearing was denied and his Motion for Rehearing on his January 15, 1988 appeal was dismissed. [2]

2.On January 23, 1990, the Department filed a motion to quash the within appeal as untimely contending that the dismissal of Swoyer's license suspension appeal by the trial court occurred on January 15, 1988. The Department's motion also included a request for counsel fees.

This Court denied the Department's motion to quash on February 21, 1990 on the basis that this appeal was not from the January 15, 1988 order but from the trial court's October 5, 1989 order which was a

As previously indicated, Swoyer's Motion for Rehearing based upon newly discovered evidence was originally scheduled to be heard by the trial court on January 31, 1989. On January 26, 1989, Swoyer's counsel requested a continuance because of a baptism.[3] The continuance was granted and the hearing rescheduled until March 13, 1989, at which time an additional continuance was requested by Swoyer's counsel because his appearance in federal court was warranted.[4] This continuance was also granted and the hearing rescheduled until April 6, 1989 with the proviso by the trial court "[n]o further continuances to be granted."

...Continued...

final, appealable order. (See Memorandum opinion filed February 21, 1990).

3.Official Record, Item No. 9.

4.Official Record, Item No. 10.

Both the record and paper file are then devoid of any documents or entries indicating what transpired between the scheduled April 6, 1989 hearing and August 9, 1989 when a third continuance was requested by Swoyer's counsel for Swoyer was again made on the basis that he had to appear in federal court.[5] The trial court continued the hearing until October 5, 1989, and again stated: "No further continuances to be granted." On October 5, 1989, another request for continuance was made by an associate of Swoyer's counsel who indicated that counsel was again in federal court.[6]

We are now requested to review the trial court's denial of Swoyer's request for a continuance and dismissal of

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5.Official Record, Item No. 11.

6.No document requesting a continuance on October 5, 1989 appears in the record.

the Motion for Rehearing.[7] Hence, the only issue before us is whether the trial court abused its discretion.

In support of the argument of an alleged abuse of discretion by the trial court, Swoyer contends, that the refusal of the trial court to grant a continuance contravenes the spirit of the Supremacy Clause of Article VI, Section 2, of the United States Constitution which provides, inter alia, that federal law supersedes any inconsistent state rules or laws. U.S. Constitution Art. VI, Section 2. Swoyer argues that as counsel was required to appear in federal and state court simultaneously, counsel was bound to attend the

---

7. Our scope of review is limited to a determination of whether the trial court's findings are supported by competent evidence, whether an error of law has been committed, and whether the trial court's decision constitutes a manifest abuse of discretion. Waigand v. Commonwealth, 68 Pa. Commonwealth Ct. 541, 449 A.2d 862 (1982).

federal court matter. We find this argument to be frivolous and lacking in merit.

Similarly, we find Swoyer's argument that counsel's scheduling conflict was not so inexcusable as to warrant dismissal and refusal to grant the continuance, to be without merit.

Pa. R.C.P. No. 216(A)[8] recognizes four grounds for continuance, which are:

> (1) Agreement of all parties or their attorneys, if approved by the Court;
>
> (2) Illness of counsel of record, a material witness, or a party...;
>
> (3) Inability to subpoena ... any material witness...;

8.We are cognizant of the Supreme Court's recent decision in In re Westinghouse Electric Corp., ____ Pa. ___, ___ A.2d ___ (31 and 32 W.D.A.D. 1989, filed May 23, 1990); however, we rely upon Rule 216 as it may assist a trial judge in exercising discretion when presented with a request for continuance.

(4) Such special ground as may be allowed in the discretion of the court.

Request for a continuance based upon counsel's appearance in federal court obviously is encompassed within special ground category number four. Hence, it is discretionary.

That granting of a continuance lies exclusively within the discretion of the trial court is well-established. Chester Housing Authority v. Nicholas, 329 Pa. Superior Ct. 136, 477 A.2d 1391 (1984). Such a determination by the trial court will not be disturbed absent an apparent abuse of discretion. Phoenix Mutual Life Insurance Co. v. Radcliffe on the Delaware, Inc., 439 Pa. 159, 266 A.2d 698 (1970); Walasavage v. Marinelli, 334 Pa. Superior Ct. 396, 483 A.2d 509 (1984).

The record evidences no abuse of discretion by the trial court. In fact, it

reflects the trial court's granting of continuances on a number of occasions in an attempt to accommodate Swoyer's counsel.

Furthermore, Pa. R.C.P. No. 216(B) provides:

> [e]xcept for cause shown in special cases, no reason.. enumerated for the continuance of a case shall be of effect beyond one application made in behalf of one party....

On three separate occasions counsel's excuse for requesting a continuance was his appearance in federal court. Such repeated requests contravene this rule.

Rule 216 is meant to prevent granting of repeated continuances. In this case, three documented continuances were granted; the trial court gave counsel two warnings that "no further continuances" were to be granted; and, hence, was justified in denying the fourth request for a continuance.

We now turn our attention to consideration of the Department's request

for counsel fees. The Department contends that Swoyer's appeal is frivolous and requests an award of counsel fees pursuant to Pa. R.A.P. 2744. A key factor in the determination of whether or not an appeal is frivolous involves a decision as to whether, as a matter of law or fact, appellant's contentions have any likelihood of success or whether continuation of the contest is reasonable. Wenger v. Commonwealth of Pennsylvania, 107 Pa. Commonwealth Ct. 20, 527 A.2d 1071 (1987). Under the circumstances of this case, an award of counsel fees to the Department under Pa. R.A.P. 2744 is warranted. Hence, we remand, on this issue alone, to the trial court for a factual determination of the amount of counsel fees and costs.

As we find no abuse of discretion by the trial court in refusal to grant Swoyer's request for continuance or in dismissal of Swoyer's Motion for Rehearing,

the order of the trial court is affirmed and the case remanded for a determination of the amount of counsel fees and costs to be awarded.

SILVESTRI SILVESTRI, Senior Judge

CONCURRING AND DISSENTING OPINION
BY JUDGE PELLEGRINI
FILED: September 10, 1990

I concur in the affirmance of the trial court's denying continuance and dismissing the motion for a rehearing, but dissent as to the awarding of counsel fees because the appeal is frivolous.

For counsel fees to be awarded on appeal as to whether, as a matter of law or fact, Swoyer's contentions have no likelihood of success and continuation of the contest is unreasonable. Wenger v. Commonwealth of Pennsylvania, 107 Pa. Commonwealth Ct. 20, 527 A.2d 1071 (1987).

Swoyer raises the issue that it was an abuse of discretion for the trial court not to grant a continuance for it contravenes the Supremacy Clause of Article VI, Section 2 of the United States Constitution. On that ground, Swoyer argues that if counsel is required to appear in federal and state courts simultaneously, counsel is

bound to attend the federal court matter. While I believe that this contention is erroneous, so many federal judges believe this to be true, how can it be frivolous?

More to the point, I do not believe that Pa. R.A.P. 2744 authorizes the imposition of counsel fees against a party where the substance of the matter on appeal involves conduct of his counsel rather than that party's interest. Pa. R.A.P. 2744 is not broad enough, and absent a provision in the Appellate Rules similar to that contained in Section 8355 of the Judicial code, 47 Pa. C.S. Section 8355, counsel fees cannot be awarded against the attorney.

For the foregoing reasons, I dissent.

DAN PELLEGRINI, JUDGE

IN THE COURT OF COMMON PLEAS OF LEHIGH, PENNSYLVANIA
CIVIL DIVISION - LAW

COMMONWEALTH OF PENNSYLVANIA, Plaintiff	:	NO. 87-C-2169
vs.	:	
RONALD FRANCIS SWOYER, Defendant	:	

ORDER

AND NOW this _____ day of _____, 1989, upon consideration of the Petitioner's Motion to Reconsider Order of October 5, 1989 Dismissing Appeal, and response thereto, it is hereby Ordered that the Order of October 5, 1989 dismissing the appeal is VACATED and that the Rule to Show Cause heretofore issued is reinstated.

BY THE COURT:

_____ J.

COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	NO. 87-C-2169
vs.	:	
RONALD FRANCIS SWOYER, Appellant	:	

ORDER

AND NOW, this 5th day of October, 1989, it appearing that on January 15, 1989, this Court filed an Order dismissing the appeal as being without merit; and it appearing further that this Court entered an Order for re-hearing on grounds of newly discovered evidence; and it appearing that on January 31, 1989, that Defendant's counsel asked for a continuance because he was attending a baptism; and it appearing further that on March 13, 1989, the Defendant's counsel was given a continuance because he was in Federal Court; and it appearing further that on August 9, 1989,

this Court again granted a continuance on the basis that Defendant's counsel was in Federal court; and it appearing further that on the same date this court directed that no further continuance be granted and that the matter be scheduled for this date, and it appearing further that counsel is again requesting a continuance on the basis of being in Federal Court; the within continuance is denied, the Petition for Re-Hearing is dismissed and the Order entered by this Court on January 15, 1988, is reinstated and the matter is remanded to the Department of Transportation.

In so ruling the Court find that:

(a) The police had reasonable grounds to believe that the Appellant had been operating his vehicle while under the influence of alcoholic beverages;

(b) Appellant was requested to submit to chemical testing as authorized by Section 1547 of the Vehicle Code;

(c) Appellant was informed by the police that his license would be suspended if he refused to submit to chemical testing; and

(d) Appellant did, in fact, refuse to submit to chemical testing.

BY THE COURT:

JOHN E. BACKENSTONE, P.J.

Supreme Court, U.S.
FILED
SEP 13 1991
OFFICE OF THE CLERK

(2)

NO. 91-124
IN THE SUPREME COURT OF THE UNITED STATES
October Term 1991

ROBERT FRANCIS SWOYER,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Timothy P. Wile
Assistant Counsel-in-Charge
Appellate Section
Counsel of Record

John L. Heaton
Chief Counsel

Harold H. Cramer
Assistant Chief Counsel
Vehicle & Traffic Law Division

Pennsylvania Department of Transportation
103 Transportation & Safety Building
Harrisburg, Pennsylvania 17120
Area Code (717) 787-2830

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QUESTIONS PRESENTED

1. Whether the supremacy clause of the Federal Constitution, Article VI, Clause 2, requires a state trial court to grant a party a continuance, in a case where the party has no constitutional or statutory right to counsel and where the trial court lacks jurisdiction to grant the party the relief sought, after numerous prior continuances had already been granted to the party and the state trial court had previously ordered that no further continuances would be granted, because of that party's counsel's alleged commitment to appear before a Federal Court?

2. Whether this Petition for Writ of Certiorari is frivolous warranting the imposition of sanctions against the Petitioner and his counsel under Supreme Court Rule 42.2?

COUNTERSTATEMENT OF THE CASE

The facts of the case underlying this petition for writ of certiorari are as follows.

On June 11, 1987, Ronald Francis Swoyer (Swoyer) (Petitioner) was stopped and arrested for driving while under the influence of alcohol, a violation of 75 Pa.C.S. §3731, and was, pursuant to the Pennsylvania implied consent law, 75 Pa.C.S. §1547, requested to submit to a chemical blood alcohol test. Swoyer refused to do so and the police officer reported that refusal to the Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing (Department) (Respondent). By official notieed dated and mailed September 8, 1987, the Department notified Swoyer that his privilege to operate a motor vehicle was being suspended for one year pursuant to the Pennsylvania implied consent law as a result of his reported refusal to submit to chemical blood alcohol testing on June 11, 1987.

On or about October 7, 1987, Swoyer filed an

appeal with the Court of Common Pleas of Lehigh County, Pennsylvania, from that notice of suspension imposed by the Department. Swoyer's appeal was heard by the common pleas court *de novo*, in accordance with 75 Pa.C.S. §1550, and Swoyer's operating privilege suspension was automatically stayed until the common pleas court issued its final determination on Swoyer's appeal. On January 15, 1988, President Judge John E. Backenstoe found that Swoyer did in fact refuse to submit to chemical blood alcohol testing following his DUI arrest, in violation of the implied consent law, dismissed Swoyer's appeal and reinstated the one-year suspension of his operating privilege. Swoyer did not appeal the January 15, 1988, order of Judge Backenstoe dismissing his appeal and reinstating the operating privilege suspension.

On or about December 22, 1988, Swoyer filed a motion with the Court of Common Pleas of Lehigh County for a rehearing of the January 15, 1988, dismissal of his operating privilege suspension appeal. Although such motions are not

permitted by Pennsylvania law in statutory appeals such as Swoyer's operating privilege suspension appeal,[1] Judge Backenstoe nevertheless granted Swoyer a further stay of the one-year operating privilege suspension initially imposed in 1987. A hearing on the motion for rehearing was scheduled for January 31, 1988, but continued at the request of Swoyer's counsel. A second hearing was scheduled for March 13, 1989, which was also continued at the request of Swoyer's counsel due to counsel being required to appear in Federal court. A third hearing on the rehearing petition was scheduled for August 9, 1989, and that hearing was also continued at Swoyer's counsel's request due to counsel's commitment to appear in Federal court. When the third hearing was rescheduled, a fourth hearing was scheduled by Judge Backenstoe for October 5, 1989, and Judge Backenstoe clearly ordered that the hearing would be held on that date and

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[1] *See* Pa.R.C.P. 227.1(g); *Department of Transportation, Bureau of Driver Licensing v. Zurka*, 135 Pa.Cmwlth. 238, 580 A.2d 466 (1990).

that Swoyer would be granted no further continuances.

On October 5, 1989, Swoyer's counsel again sought to continue the hearing on the basis that he was required to appear in Federal court. Judge Backenstoe refused to grant Swoyer a fourth continuance and dismissed the motion for rehearing.

Swoyer appealed Judge Backenstoe's order of October 5, 1989, to the Commonwealth Court of Pennsylvania. On September 10, 1990, a three-judge panel of the Commonwealth Court of Pennsylvania, in an unreported memorandum decision, affirmed the order of the Court of Common Pleas of Lehigh County dismissing Swoyer's motion for a rehearing of his operating privilege suspension appeal. Additionally, the Commonwealth Court of Pennsylvania determined that Swoyer's appeal of Judge Backenstoe's dismissal of his motion for rehearing was "wholly frivolous" within the meaning the Pennsylvania Rules of Appellate Procedure, Pa.R.A.P. 2744, and awarded the Department counsel fees

against both Swoyer and his appellate attorney. Swoyer filed for reconsideration of the decision of the three-judge panel of the Commonwealth Court and the Commonwealth Court denied reconsideration by order dated November 9, 1990.

Swoyer then filed a petition for allowance of appeal to the Supreme Court of Pennsylvania. The Pennsylvania Supreme Court denied Swoyer's petition for allowance of appeal by order entered May 2, 1991. On July 22, 1991, Swoyer filed the instant petition for writ of certiorari with this Honorable Court.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Swoyer's sole Federal issue upon which he bases his petition for a writ of certiorari is his contention that the Supremacy Clause of the Federal Constitution, Article VI, cl. 2, required Judge Backenstoe to grant him a fourth continuance of the hearing on his motion for rehearing because his counsel had a commitment in Federal court. The denial of Swoyer's request for a fourth continuance regarding his motion for new trial or rehearing in his operating privilege suspension appeal, upon which Swoyer's Federal supremacy issue is based, is not dispositive of his case since the underlying motion itself is not authorized by Pennsylvania law and the common pleas court lacked the power to grant Swoyer a rehearing or new trial. Thus, even if the common pleas court erred in not granting Swoyer the fourth continuance his counsel sought, the error would constitute harmless error. Accordingly the Department respectfully submits to this Honorable Court that Swoyer's purported Federal issue under Article VI, cl. 2, of the Federal Constitution does not

warrant review by this Honorable Court.

A. Swoyer's Motion for New Trial was a Nullity Under Pennsylvania Law and any Error the Trial Court Made by Denying the Fourth Continuance Was Harmless Error.

This case is primarily the latest stage of a motorist's determined and persistent effort to avoid the mandatory penalty set by the Pennsylvania General Assembly for motorists who are arrested for drunk driving and who refuse to submit to a chemical blood alcohol test as required by the provisions of Pennsylvania's implied consent law. The Department imposed such a suspension on Swoyer when he refused such a chemical test. Swoyer appealed that suspension pursuant to 75 Pa.C.S. §1550 was provided with the *de novo* hearing on the fact of his refusal of chemical blood alcohol testing before the Court of Common Pleas of Lehigh County, Pennsylvania. The common pleas court, after hearing the evidence, found that Swoyer had in fact violated the requirements of the Pennsylvania implied consent law by refusing to submit to a chemical test that and the mandatory one-year suspension of his privilege to operate a motor

vehicle was warranted under 75 Pa.C.S. §1547. The common pleas court's order dismissing Swoyer's appeal was entered January 15, 1988. This procedure more than satisfied Swoyer's due process rights under this Honorable Court's decision in *Mackey v. Montrym*, 443 U.S. 1 (1979).

Under Pennsylvania law, Swoyer had 30 days to appeal Judge Backenstoe's January 15, 1988, order dismissing his 1987 appeal to the Commonwealth Court of Pennsylvania. *See* 42 Pa.C.S. §§762(a)(3) and 5571(a); Pa.R.A.P. 903(a). He did not do so. Instead, Swoyer attempted to file a motion for a new trial, nine months later, well after the expiration of the applicable appeal period. The law in Pennsylvania governing statutory appeals, which includes motorist appeals of notices of operating privilege suspension imposed by the Department, does not allow the filing of post-trial motions such as the motion for rehearing or a new trial filed by Swoyer in December 1988. *See* Pa.R.C.P.

227.1(g);[2] *Department of Transportation, Bureau of Driver Licensing v. Zurka,* 135 Pa.Cmwlth. 238, 580 A.2d 466 (1990); *Shaw v. Department of Transportation, Bureau of Driver Licensing,* 122 Pa.Cmwlth. 636, 553 A.2d 108 (1989). Additionally, any order entered by a common pleas court granting such an unauthorized motion for a new trial or rehearing in a statutory appeal would be a legal nullity since such post-trial motions are not authorized by Pennsylvania law. *Zurka.*

In addition to motions for new trials not being authorized in such statutory appeals under Pennsylvania law, the

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[2]Rule 227.1(g) of the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. 227.1(g), provides:

> **Rule 227.1. Post-Trial Relief.**
>
> * * *
>
> (g) A motion for post-trial relief may ***not*** be filed in an appeal from the final adjudication or determination of a local agency or a Commonwealth agency as to which jurisdiction is vested in the courts of common pleas.

Pa.R.C.P. 227.1(g)(Emphasis added).

common pleas court had only 30 days from the date of entry of its original order to modify, rescind vacate, or amend that order. 42 Pa.C.S. §5505.[3] Once that thirty day period had expired, the common pleas court lost jurisdiction and was without the power or authority to vacate, amend or otherwise modify its previous order. *Zurka; Department of Transportation, Bureau of Driver Licensing v. Grassi,* 129 Pa.Cmwlth. 387, 565 A.2d 865 (1989), *appeal granted,* ___ Pa. ___, 578 A.2d 931 (1990). In Swoyer's case, the 30-day modification period of 42 Pa.C.S. §5505 had long since expired when he asked the common pleas court to

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[3]Section 5505 of the Judicial Code, 42 Pa.C.S. §5505, provides:

> **§5505. Modification of orders**
>
> Except as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed.

42 Pa.C.S. §5505.

grant him a new trial on his operating privilege suspension appeal. The common pleas court, under Pennsylvania law, was powerless to grant him the relief he desired in his motion for new trial since that tribunal lacked jurisdiction over the operating privilege suspension appeal. Accordingly, the dismissal of that motion in October of 1989 was proper and mandated by Pennsylvania law. The denial of Swoyer's fourth continuance request was at most, therefore, harmless error.

B. The Trial Court's Refusal to Grant Swoyer a Fourth Continuuance Was Proper Under Pennsylvania Law.

In addition to the denial of Swoyer's fourth continuance request being, at most, harmless error, the Department also respectfully submits that the denial of that continuance was proper and entirely within the common pleas court's discretion under Pennsylvania law. Pa.R.C.P. 216.[4]

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[4]The pertinent provision of Rule 216 of the Pennsylvania Rules of Civil Procedure under which Swoyer was seeking a continuance was subsection 216(A)(4), which provides:

Rule 216. Grounds for Continuance.

Under Pennsylvania law, a common pleas court judge's discretion in granting or denying a continuance will only be reversed where there is a clear showing that the common pleas court manifestly abused its discretion. *Phoenix Mutual Life Insurance Co. v. Radcliffe on the Delaware, Inc.*, 439 Pa. 159, 266 A.2d 698 (1970).

Here, Swoyer contends that Judge Backenstoe of the Court of Common Pleas of Lehigh County abused his discretion when he refused Swoyer's request to continue the October 5, 1989, hearing on his motion for a new trial due to his lawyer's scheduling conflict. The request for a continuance of the October 5, 1989, hearing was not, however, Swoyer's first continuance request of his motion for new trial. Actually, it was

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(A) The following are grounds for continuance:

* * *

(4) Such special ground as may be allowed ***in the discretion of the court.***

Pa.R.C.P. 216(A)(4)(Emphasis added).

his ***fourth*** such request. In the order continuing an earlier hearing date to August 1989 the common pleas court had included in its order that no further continuances would be granted. Still, Swoyer was given one last continuance, until October 5, 1989, and Judge Backenstoe included in the August 1989 grant of a continuance to October 5, 1989, that absolutely no further continuances would be granted to Swoyer. There is no abuse of discretion on the part of Judge Backenstoe in refusing to continue this case for a ***fourth*** time. Additionally, Swoyer's request for this fourth continuance was made on October 5, 1989, at the time scheduled for the hearing on his motion for re-hearing, no advance request was made as required by Pa.R.C.P. 216(C).[5]

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[5]Subsection (C) of Rule 216 of the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. 216(C), provides:

Rule 216. Grounds for Continuance.

* * *

(C) No application for continuance shall be granted if based on a cause existing and known at the time of publication or prior call of the trial list unless the same is presented to the court at a time fixed by the court,

The Pennsylvania Superior Court, in *Lighting Unlimited, Inc., Lighting Pittsburgh Division v. Unger Construction Co.*, 217 Pa.Super. 252, 269 A.2d 368 (1970), upheld the denial of a continuance by a common pleas judge to a party where the continuance request was likewise predicated upon the party's counsel's scheduling conflict with another trial. In upholding the common pleas court's exercise of discretion in denying the requested continuance, the Pennsylvania Superior Court specifically noted that the requesting party had a record of prior continuances covering a period of approximately 10 months and that counsel in that case knew of the pending conflict prior to the date of the arbitration. Like Swoyer's counsel in this matter,

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> which shall be at least one week before the first day of the trial period. Applications for continuances shall be made to the court or filed in writing with the officer in charge of the trial list, after giving notice of such application by mail, or otherwise, to all parties or their attorneys. Each court may, by local rule, designatethe time of publication of the trial list for the purpose of this rule.

Pa.R.C.P. 216(C).

the counsel in *Lighting Unlimited* also had a commitment in Federal court at the same time as the arbitration that gave rise to the appeal. In that case, the Superior Court noted that the "[p]roper and expedient administration of the court calendar does not permit such known previous commitment to be used as reason for continuing a trial which had already been continued several times." *Lighting Unlimited,* 217 Pa.Super. at ___, 269 A.2d at 369.

Like the absent attorney in *Lighting Unlimited,* Swoyer's counsel also had a conflicting commitment on the day of the hearing that required his presence in Federal court. Like the situation in *Lighting Unlimited,* Swoyer's case had been continued on several previous occasions, with the October 5, 1989, scheduled hearing being 10 months after the initial motion for new trial having been filed.

Pennsylvania's appellate courts have likewise upheld the exercise of discretion by common pleas court judges who deny continuances to a party that had been previously

granted a number of continuances in the same case. For example, the Pennsylvania Supreme Court in *Farmer's National Bank & Trust of New Holland v. New Holland National Bank*, 333 Pa. 428, 5 A.2d 198 (1939), upheld a common pleas court's denial of a continuance to a party where the common pleas court had granted three previous continuances, as is the case here. The Pennsylvania Superior Court in *Pierce v. Penman*, 357 Pa.Super. 225, 515 A.2d 948 (1986), *appeal denied*, 515 Pa. 608, 529 A.2d 1082 (1987), upheld the denial of a continuance to a physician where the physician had been granted previous continuances and had also changed his counsel. Previously, in *In re Hall*, 288 Pa.Super. 495, 532 A.2d 621 (1982), the Superior Court upheld a refusal to grant a continuance to a party that had been previously granted a nine-day continuance to specifically to prepare for the hearing.

C. There is No Federal Issue that Merits the Granting of Swoyer's Petition for Writ of Certiorari.

The Department respectfully submits that this is a

classic example of a frustrated litigant attempting to make a federal case out of a matter that has no business being brought before the Federal judiciary. According to Swoyer, his counsel of choice could not be present at the October 5, 1989, hearing because of a conflicting commitment that required his counsel to appear in federal court on another matter. Swoyer argues that the Supremacy Clause of the Federal Constitution, Article VI, cl. 2, required Judge Backenstoe to grant him that continuance due to his commitment to appear in Federal court. The Supremacy Clause does not come to Swoyer's aid in this case.

The Supremacy Clause, Article VI, cl. 2, provides:

> **Clause 2. Supreme Law of Land.**
>
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S.Const. Art. VI, cl. 2. The Federal courts have interpreted

the Supremacy Clause as being intended to eliminate the right of any state to regulate the operations of the Federal government without the Federal government's express consent. *See, e.g., United States v. State Corporation Commission of Commonwealth of Virginia,* 345 F.Supp. 843 (E.D.Va. 1972), *aff'd,* 409 U.S. 1094 (1973). Where state law interferes with, or is contrary to, Federal law, the state law must yield. *Free v. Bland,* 369 U.S. 663 (1962).

The Department respectfully submits that the Article VI, cl. 2, is inapplicable to this case. The Supremacy Clause does not support direct causes of action, rather, it merely gives priority to federal rights created by Federal statutes when those Federal rights conflict with state laws. *See, e.g., Mashpee Tribe v. Watt,* 542 F.Supp. 797 (D.Mass. 1982), *aff'd,* 707 F.2d 23 (1st Cir. 1983), *cert. denied,* 464 U.S. 1020 (1983). There is, of course, no Federal constitutional provision, statute or rule of court that mandates that a party to a lawsuit in a state court whose lawyer has a scheduling conflict in Federal court is entitled

to a continuance of the state court proceeding so that the lawyer may appear in Federal Court. Nor is there any reported Federal or Pennsylvania appellate decision that holds that Article VI, cl. 2, of the Federal Constitution requires a state trial court to grant a party a continuance on the basis that the requesting party's counsel of choice has a scheduling conflict due to a required appearance in Federal Court. In fact, this very Court has held that the States may establish rules of procedure governing litigation in their ***own*** courts. *Felder v. Casey*, 487 U.S. 131 (1988). This matter involves a ***Pennsylvania*** claim, brought in a ***Pennsylvania*** trial court, governed by ***Pennsylvania*** law and rules of court. Accordingly, the Department respectfully submits that there is absolutely no Federal issue present in this case warranting review by this Honorable Court.

D. Swoyer's Petition for Writ of Certiorari is Frivolous Warranting Sanctions Under Rule 42.2.

In addition to there being no Federal issue of merit warranting review by this Honorable Court, the Department

also contends that Swoyer's Petition for Writ of Certiorari is frivolous within the meaning of Supreme Court Rule 42.2 and requests that this Honorable Court grant the Department an award of double costs and reasonable attorney's fees pursuant to Rule 42.2.[6] The Department further requests that such an award be made against Swoyer and his appellate counsel, jointly and severally, as specifically permitted by Rule 42.2.

This petition is frivolous for a number of reasons. First, the Department notes that Swoyer has presented no Federal issue that warrants review by this Honorable Court and that the issue was decided by the Pennsylvania Commonwealth Court based upon that Court's interpretation of a ***Pennsylvania*** rule of

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[6]Supreme Court Rule 42.2 provides:

> **.2.** When a petition for writ of certiorari, an appeal, or application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs. Damages or costs may be awarded against the petitioner, appellant, or applicant, or against the party's attorney, or against both.

civil procedure, using Pennsylvania law. Additionally, the hearing that Swoyer sought to have continued for a ***fourth*** time pertained to a motion that Swoyer had no authority to file, that the common pleas court had no jurisdiction to entertain, and sought relief that the common pleas court was powerless to grant. Even if the common pleas court did err in refusing to grant Swoyer yet another continuance of the hearing on his motion for new trial, that error was at best harmless error. Finally, the Pennsylvania Commonwealth Court specifically found that Swoyer's appeal to ***that*** Court was frivolous under Pennsylvania law within the meaning of Pa.R.A.P. 2744 and granted the Department an award of costs and reasonable counsel fees against Swoyer and his appellate counsel, jointly and severally.

This Court, in *McCoy v. Court of Appeals of Wisconsin, District 1*, 486 U.S. 429 (1988), when dealing with an appellate attorney's obligations to the Court in filing and prosecuting a *criminal* appeal, said:

Neither paid nor appointed counsel may deliberately

> mislead the court with respect to either the facts or the law, or consume the time and energies of the court ***or the opposing party*** by advancing frivolous arguments. An attorney, whether appointed or paid, is therefor under an ethical obligation to refuse to prosecute a frivolous appeal.
>
> > "A lawyer, after all, has no duty, indeed, no right, to pester a court with frivolous arguments, which is to say arguments that cannot conceivably persuade the court, * * * United States v. Edwards, 777 F.2d 364, 365 (7th Cir. 1985).
> >
> > When retained counsel concludes that an appeal would be frivolous, he or she has a duty to advise the client that it would be a waste of the client's money to prosecute the appeal and that it would be unethical for the lawyer to go forward with it.

McCoy, 486 U.S. at 436-437 (Emphasis added). In *Polk County v. Dodson*, 454 U.S. 312 (1981), this Honorable Court also held that it was the ethical obligation of every lawyer, whether paid or appointed, not to clog the courts with frivolous motions or appeals. *Dodson*, 454 U.S. at 323.

Here, Swoyer ignores the patent jurisdictional defect present at the common pleas court level that absolutely precluded that court from granting the ultimate relief he desired,

a new trial on his implied consent law suspension, and instead attempts to focus this Honorable Court's attention on his purported Federal constitutional claim under the Supremacy Clause. Under Pennsylvania law, spanning a period of over a century and a half, has consistently held that an order or judgment rendered by a tribunal lacking subject-matter jurisdiction is void and of no legal effect and is subject to collateral attack by any party in any proceeding against whom such a judgment or order is sought to be interposed. *See, e.g., Smith v. Gallagher,* 408 Pa. 530, 185 A.2d 135 (1962); *Moskowitz's Registration Case,* 329 Pa. 183, 196 A. 498 (1938); *Simpson's Estate,* 253 Pa. 217, 98 A. 35 (1916); *Wall v. Wall,* 123 Pa. 545, 16 A. 598 (1889); *Camp v. Wood,* 10 Watts 118 (Pa. 1840). Thus, any order by the common pleas court purporting to vacate the January 1988 order dismissing Swoyer's operating privilege suspension appeal and granting Swoyer a re-hearing or new trial on that appeal would, under Pennsylvania law, be void *ab initio* and of no legal force or effect. *See*

Tarnopolski v. Department of Transportation, Bureau of Driver Licensing, ___ Pa.Cmwlth. ___, 589 A.2d 289 (1991)(order of district justice purporting to acquit minor of underage drinking charge entered after expiration of modification or appeal period following minor's initial conviction of that charge was void since the district justice lacked subject-matter jurisdiction over minor's criminal case under Pennsylvania law).

In interpreting Pennsylvania's rule of appellate procedure dealing with sanctions for frivolous appeals, the Pennsylvania Supreme Court, in *Robinson v. Pennsylvania Board of Probation and Parole*, 525 A.2d 505, 582 A.2d 857 (1990), held that an appeal was frivolous and the appellant's attorney was subject to sanctions where an appeal was filed outside of the applicable appeal period, with no explanation given for the untimely filing, thus depriving the court of jurisdiction over the appeal, and the attorney ignores the patent jurisdictional defect

constituted a frivolous appeal under Pa.R.A.P. 2744.[7] Thus, under the reasoning set forth by the Pennsylvania Supreme Court in *Robinson*, Swoyer's conduct in continuing to pursue his purported Federal claim under the Supremacy Clause to this Honorable Court while continuing to ignore the patent jurisdictional defect that deprived the common pleas court of

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[7]Rule 2744 of the Pennsylvania Rules of Appellate Procedure, Pa.R.A.P. 2744, provides:

> **Rule 2744. Further Costs. Counsel Fees. Damages for Delay.**
>
> In addition to other costs allowable by general rule or Act of Assembly, an appellate court may award as further costs damages as may be just, including
>
> (1) a reasonable counsel fee; and
>
> (2) damages for delay at the rateof 6% per annum in addition to legal interest,
>
> if it determines that an appeal is frivolous or taken solely for delay or that the conduct of the participant is dilatory, obdurate or vexatious. The appellate court may remand the case to the trial court to determine the amount of damages authorized by this rule.

Pa.R.A.P. 2744. *See also* Darlington, McKeon, Schuckers & Brown, 2 Pennsylvania Appellate Practice §2744:2 (1990 Supp.).

jurisdiction to hear his underlying State claim, constitutes a frivolous appeal. While this Court is clearly not bound by the characterization of such appeals set forth by the Pennsylvania Supreme Court in *Robinson*, the Department respectfully submits that the reasoning used by the Pennsylvania Supreme Court is sound and logical and supports the Department's claim here for sanctions under Supreme Court Rule 42.2. *See also Smith v. Pennsylvania Board of Probation and Parole*, 524 Pa. 500, 574 A.2d 558 (1990).

The Department respectfully submits that this Honorable Court grant the Department's application for sanctions under Supreme Court Rule 42.2 and impose reasonable attorneys' fees and double costs against both Swoyer and his appellate counsel, jointly and severally. Swoyer clearly filed a motion with the common pleas court that, under Pennsylvania law, he was not authorized to file nor was the common pleas court vested with authority to grant the relief he sought. Pa.R.C.P. 227.1(g); *Zurka; Grassi*. The Commonwealth Court of Pennsylvania, on

Swoyer's initial appeal of Judge Backenstoe's dismissal of his unauthorized motion and refusal to grant a fourth continuance, clearly held that the motion and relief Swoyer sought from Judge Backenstoe was not authorized in statutory appeals and that Judge Backenstoe was without jurisdiction to grant Swoyer the relief he sought. The Commonwealth Court also found Swoyer's appeal from the dismissal of his unauthorized motion frivolous under Pa.R.A.P. 2744 and granted the Department an award of reasonable counsel fees and costs under that rule against both Swoyer and his appellate counsel. Swoyer then sought review by the Pennsylvania Supreme Court, again ignoring the clear jurisdictional defect upon which the Commonwealth Court based its ruling that Swoyer's appeal was frivolous and its award of sanctions. The Pennsylvania Supreme Court denied allowance to appeal and Swoyer has advanced the same tired argument to this Honorable Court, still ignoring the glaring, and fatal, jurisdictional defect that precludes the common pleas court from granting him the relief he initially sought. At each of these

proceedings, the Department has been required, as it is here, to defend against Swoyer's appeals, causing needless expense to the taxpayers of the Commonwealth of Pennsylvania. As set forth by this Court in *McCoy*, neither Swoyer nor his appellate counsel, Mr. Orloski, have a right to pester this Court with frivolous motions or appeals. 486 U.S. at 436. As a result of Swoyer's frivolous petition for certiorari filed with this Honorable Court, the taxpayers of the Commonwealth of Pennsylvania have been forced, through the expenditure of the time and energies of the Department's attorneys and clerical staff, to incur needless costs and expenses. Rule 42.2 allows this Court to place the burden of those costs and expenses upon the party at fault in frivolous cases and the Department respectfully requests that this Honorable Court grant the Department's application for sanctions under Rule 42.2 against both Swoyer and his appellate counsel, Richard J. Orloski, Esquire, jointly and severally.

CONCLUSION

For the reasons set forth above, the Commonwealth of Pennsylvania, Department of Transportation, respondent herein, respectfully submits that a writ of certiorari should not be granted in this case and the respondent should be awarded damages in the form of reasonable attorneys' fees and double costs against Ronald Francis Swoyer and his appellate counsel, Richard J. Orloski, Esquire, jointly and severally, as provided in Supreme Court Rule 42.2.

Respectfully submitted,

Timothy P. Wile
Assistant Counsel-in-Charge
Appellate Section
Counsel of Record

John L. Heaton
Chief Counsel

Harold H. Cramer
Assistant Chief Counsel
Vehicle & Traffic Law Division

Pennsylvania Department
of Transportation

Attorneys for Respondent

Supreme Court, U.S.
FILED
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(3)

NO: 91-124
IN THE SUPREME COURT OF THE UNITED STATES

ROBERT FRANCIS SWOYER,
Petitioner

Versus

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

ANSWER IN OPPOSITION TO RESPONDENT'S APPLICATION FOR AWARD OF DAMAGES

Richard J. Orloski
Attorney for Petitioner
Attorney ID. #09857

ORLOSKI & HINGA
1005 South Cedar Crest Boulevard
Allentown, Pennsylvania 18103
(215) 433-2363

QUESTION

WHETHER OR NOT RESPONDENT IS ENTITLED TO AN AWARD OF DAMAGES AGAINST PETITIONER AND PETITIONER'S ATTORNEY WHERE:

1) PETITIONER'S PETITION FOR A WRIT OF CERTIORARI INVOLVES AN IMPORTANT FEDERAL CONSTITUTIONAL ISSUE;

2) ONE OF THE THREE COMMONWEALTH JUDGES FOUND THAT FEDERAL JUDGES THINK THAT THEIR CASES TAKE PRIORITY UNDER THE SUPREMACY CLAUSE, BUT THEY ARE IN ERROR; AND

3) RESPONDENT'S HAVE OFFICIALLY REQUESTED THAT THE APPELLATE COURT OFFICIAL REPORT IS OPINION ON THE SUPREMACY CLAUSE BECAUSE OF THE LANDMARK IMPORTANCE OF PETITIONER'S FEDERAL CONSTITUTIONAL ISSUE WHICH OPINION RESPONDENT STATES WAS THE FIRST APPELLATE DECISION ON THIS SIGNIFICANT ISSUE?

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REASONS WHY RESPONDENT'S APPLICATION FOR AWARD OF DAMAGES SHOULD NOT BE GRANTED

Petitioner herein incorporates the Concise Statement Of The Case in his Petition for Writ of Certiorari. Respondent has moved the state court to publish its landmark decision which is the subject of the Petition for Writ of Certiorari holding that an attorney's state court action may be dismissed on the merits in the attorney's absence if the attorney cannot appear in state court due to the fact the attorney is simultaneously appearing in Federal Court. Penndot vs. Swoyer, ____ Leh. C.P. ____, affirmed ___ Cmlth Ct. ____, ____ A2d. _____, allocatur denied, ____ Pa ____, ____ A2d. ____ (1991), (See Commonwealth Decision in Appendix A, page 9). Apparently, attorneys are desirous of having the Commonwealth Court Opinion officially reported so they can

use it in State Court proceedings to argue that the Supremacy Clause does not give the Federal Judiciary Priority in scheduling. Hence, every time an attorney has a schedule conflict between State and Federal Court appearances, Respondent will use said opinion to proceed to dismissal of the State Court action. See, Respondent's Application to Report Unreported Opinion attached as Appendix B 24 where the Respondent tells Commonwealth Court that its opinion is an important determination which is the first case of its kind decided by a State Court in Pennsylvania.

Despite the patent contradiction, Respondent simultaneously has applied to this Honorable Court for attorney fees against Petitioner claiming that Petitioner's appeal is "frivolous" whereas in Commonwealth Court it argues that it is

an important case of first impression going State Court scheduling matters priority over Federal Cases.

Respondent has mischaracterized the facts in its argument in support of its application for Award of Damages. Specifically, the trial court addressed Petitioner's motion to present discovered evidence on the merits without Petitioner or his counsel present, and without an opportunity to be heard, and decided the case on the merits. Respondent has mischaracterized the facts in its agreement in support of its application for Award of Damages. The Honorable John E. Backenstone never addressed the issue of subject matter jurisdiction. To the extent Respondents have otherwise misstated the procedural history, the record speaks for itself. For the reasons set forth below, Respondent's Application

for Damages ought to be denied.

A frivolous argument is one that cannot conceivably persuade the court. United States v. Edwards, 777 F.2d 364, 365 (7th Cir. 1985). Here, Petitioner's argument could not only conceivably persuade the court, but if the Petitioner fails, the Supremacy Clause will be turned on its head and State Court proceedings must take priority over Federal Court proceedings in the in the Commonwealth of Pennsylvania. Hence, Respondent's application for damages ought to be denied.

1. One of the three Pennsylvania appellate judges deciding Petitioner's appeal, specifically found that Petitioner's federal constitutional claim is not frivolous.

In the opinion by the Commonwealth

Court concerning the merit of Petitioner's appeal, Judge Pellegrini stated,

> **"On that ground, Swoyer argues that if counsel is required to appear in Federal and State Courts simultaneously, counsel is bound to attend the Federal matter. While I believe that this contention is erroneous, so many Federal Judges believe this to be true, how can it be frivolous?"**

Judge Pellegrini aptly summarized the contradiction: in Pennsylvania, Federal Judges take priority over State Court proceedings. State Court Judges, however, are now on record for the opposite proposition.

Accordingly, Petitioner's appeal is not "one that cannot conceivably persuade the court." U.S. v. Edwards, infra. Hence, Petition appeal to this Honorable Court is not frivolous. Id.

2. Petitioner's Petition for a Writ of Certiorari involves a substantial Federal question.

The Petitioner contends that the Pennsylvania Court's erroneously interpreted and applied the Supremacy Clause of the United States Constitution. Article VI d. 2 of the U.S. Constitution. For the reasons set forth at length (and incorporated herein in Petitioner's Petition for Writ of Certiorari) Petitioner's petition involved an important Federal Question and is not frivolous.

Additionally, although Respondent was not so required, Respondent chose to file a Brief in opposition to Petitioner's Petition for a Writ of Certiorari because of the significance of Petitioner's appeal. If Petitioner's appeal truly was frivolous, why did Respondent voluntarily

incur expenses responding to the merits? Respondent, through its actions before this Court, and in filing Application To Report Unreported Opinion indicates that this is a significant case which will impact on the authority of Federal Courts to control its docket. By its actions, Respondent has acknowledged that Petitioner's Petition for Writ of Certiorari is not frivolous.

2. Respondent has admitted that Petitioner's appeal involves an important Federal question on which no Pennsylvania appellate decision existed.

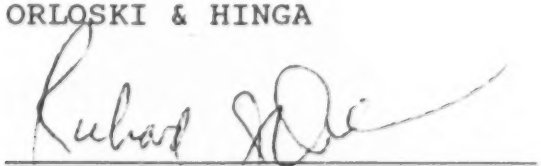
On or about September 25, 1991 Respondent filed an Application to Report Unreported Opinion of Commonwealth Court of Pennsylvania. A true and correct copy of Respondent's Application is attached hereto as Appendix B (See 24).

Respondent's aforesaid application acknowledges that Petitioner's appeal raised an important Federal question Appendix B, 24. Further, Respondent notes that no Pennsylvania appellate decision existed on the issue which is the subject of Petition for Writ of Certiorari. Petitioner's appeal of the unprecedented, landmark decision involving the Supremacy Clause is not frivolous. Hence, Respondent's Application for Damages ought to be denied.

CONCLUSION

For the foregoing reasons, Respondent's Application for Award of Damages ought to be DENIED.

ORLOSKI & HINGA



Richard J. Orloski
Attorney for Petitioner

APPENDIX A: OPINION OF COMMONWEALTH COURT

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RONALD FRANCES SWOYER, Appellant	:	
	:	NO.
	:	2062 C.D 1989
vs.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Appellee	:	

BEFORE:

HONORABLE JAMES CRUMLISH, JR.,
President Judge

HONORABLE DAN PELLEGRINI,
Judge

HONORABLE SILVESTRI SILVESTRI,
Senior Judge

SUBMITTED ON BRIEFS: March 30, 1990

OPINION NOT REPORTED

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RONALD FRANCES SWOYER, Appellant	:	
	:	NO.
	:	2062 C.D 1989
vs.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Appellee	:	

ORDER

AND NOW, this 10th day of September, 1990, the decision of the Court of Common Pleas of Lehigh County denying continuance and dismissing the Motion for Rehearing of Appellant is hereby affirmed, and the case remanded for determination of the amount of counsel fees and costs to be awarded to Appellee, Department of Transportation. Jurisdiction relinquished.

MEMORANDUM OPINION BY

SENIOR JUDGE SILVESTRI

FILED: Sept. 10, 1990

Ronald Francis Swoyer (Swoyer) appeals from the October 5, 1989 order of the Court of Common Pleas of Lehigh County (trial court) denying his request for a continuance and dismissing his Motion for Rehearing on Grounds of Newly Discovered Evidence (Motion for Rehearing) of his appeal from an order of the Department of Transportation (Department) suspending his operating privileges.

The events giving rise to the present appeal are as follows. Swoyer's operating privileges were suspended by the Department for one year for his refusal to submit to chemical testing pursuant to

Section 1547 of the Vehicle Code.[1]

On or about October 7, 1987, Swoyer appealed the order suspending his operating privileges to the trial court. A hearing was held on January 15, 1988 at which the trial court determined that Swoyer had refused to take the breathalyzer and issued an order, on the same date, denying his license suspension appeal. Swoyer never filed an appeal from the January 15, 1988 order of the trial court.

---

[1]Section 1547(b) of the Vehicle Code, 75 Pa. C.S. Section 1547(b), in pertinent part provides:

> (b) Suspension for refusal.--
> If any person placed under arrest for a violation of Section 3731 (relating to driving under influence of alcohol or controlled substance) is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person for a period of 12 months.

Subsequently, on December 23, 1989, new counsel for Swoyer filed a Motion for Rehearing of his appeal based upon newly discovered evidence. The newly discovered evidence involved a discrepancy between testimony of the breathalyzer operator at the license suspension hearing and the criminal trial on drunk driving at which Swoyer was found not guilty. The trial court ordered a hearing on Swoyer's December 23, 1988 Motion for Rehearing based upon this newly discovered evidence. The hearing was scheduled for January 31, 1989.

By order of the trial court dated October 5, 1989, Swoyer's fourth request for a continuance of the hearing was denied and his Motion for Rehearing on his

January 15, 1988 appeal was dismissed.[2]

As previously indicated, Swoyer's Motion for Rehearing based upon newly discovered evidence was originally scheduled to be heard by the trial court on January 31, 1989. On January 26, 1989, Swoyer's counsel requested a continuance because of a baptism.[3] The continuance was granted and the hearing rescheduled until March 13, 1989, at which time an additional continuance was requested by

---

[2]On January 23, 1990, the Department filed a motion to quash the within appeal as untimely contending that the dismissal of Swoyer's license suspension appeal by the trial court occurred on January 15, 1988. The Department's motion also included a request for counsel fees.

This court denied the Department's motion to quash on February 21, 1990 on the basis that this appeal was not from the January 15, 1988 order but from the trial court's October 5, 1989 order which was a final, appealable order. (See Memorandum opinion filed February 21, 1990).

[3]Official Record, Item No. 9.

Swoyer's counsel because his appearance in federal court was warranted.[4] This continuance was also granted and the hearing rescheduled until April 6, 1989 with the proviso by the trial court "[n]o further continuances to be granted."

Both the record and paper file are then devoid of any documents or entries indicating what transpired between the scheduled April 6, 1989 hearing and August 9, 1989 when a third continuance was requested by Swoyer's counsel for Swoyer was again made on the basis that he had to appear in federal court.[5] The trial court continued the hearing until October 5, 1989, and again stated: "No further continuances to be granted." On October 5, 1989, another request for continuance was

---

[4]Official Record, Item No. 10.

[5]Official Record, Item No. 11.

made by an associate of Swoyer's counsel who indicated that counsel was again in federal court.[6]

We are now requested to review the trial court's denial of Swoyer's request for a continuance and dismissal of the Motion for Rehearing.[7] Hence, the only issue before us is whether the trial court abused its discretion.

In support of the argument of an alleged abuse of discretion by the trial court, Swoyer contends that the refusal of the trial court to grant a continuance contravenes the spirit of the Supremacy

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[6]No document requesting a continuance on October 5, 1989 appears in the record.

[7]Our scope of review is limited to a determination of whether the trial court's findings are supported by competent evidence, whether an error of law has been committed, and whether the trial court's decision constitutes a manifest abuse of discretion. Waigand v. Commonwealth, 68 Pa. Commonwealth Ct. 541 449 A.2d 862 (1982).

Clause of Article VI, Section 2, of the United States Constitution which provides, inter alia, that federal law supersedes any inconsistent state rules or laws. U.S. Constitution Art. VI, Section 2. Swoyer argues that as counsel was required to appear in federal and state court simultaneously, counsel was bound to attend the federal court matter. We find this argument to be frivolous and lacking in merit.

Similarly, we find Swoyer's argument that counsel's scheduling conflict was not so inexcusable as to warrant dismissal and refusal to grant the continuance, to be without merit. Pa. R.C.P. No. 216(A)[8]

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[8]We are cognizant of the Supreme Court's recent decision in re Westinghouse Electric Corp., _____ Pa. _____, _____ A.2d _____ (31 and 32 W.D.A.D. 1989, filed May 23, 1990); however, we rely upon Rule 216 as it may assist a trial judge in exercising discretion when presented with a request for continuance.

recognizes four grounds for continuance, which are:

> (1) Agreement of all parties or their attorneys, if approved by the Court;
>
> (2) Illness of counsel of record, a material witness, or a party...;
>
> (3) Inability to subpoena ... any material witness...;
>
> (4) Such special ground as may be allowed in the discretion of the court.

Request for a continuance based upon counsel's appearance in federal court obviously is encompassed within special ground category number four. Hence, it is discretionary.

That granting of a continuance lies exclusively within the discretion of the trial court is well-established. Chester Housing Authority v. Nicholas, 329 Pa. Superior Ct. 136, 477 A.2d 1391 (1984). Such a determination by the trial court will not be disturbed absent an apparent

abuse of discretion. Phoenix Mutual Life Insurance Co. v. Radcliffe on the Delaware, Inc., 439 Pa. 159, 266 A.2d 698 (1970); Walasavage v. Marinelli, 334 Pa. Superior Ct. 396, 483 A.2d 509 (1984).

The record evidences no abuse of discretion by the trial court. In fact, it reflects the trial court's granting of continuances on a number of occasions in an attempt to accommodate Swoyer's counsel.

Furthermore, Pa. R.C.P. No. 216(B) provides:

> [e]xcept for cause shown in special cases, no reason.. enumerated for the continuance of a case shall be of effect beyond one application made in behalf of one party....

On three separate occasions counsel's excuse for requesting a continuance was his appearance in federal court. Such

repeated requests contravene this rule.

Rule 216 is meant to prevent granting of repeated continuances. In this case, three documented continuances were granted; the trial court gave counsel two warnings that "no further continuances" were to be granted; and, hence, was justified in denying the fourth request for a continuance.

We now turn our attention to consideration of the Department's request for counsel fees. The Department contends that Swoyer's appeal is frivolous and requests an award of counsel fees pursuant to Pa. R.A.P. 2744. A key factor in the determination of whether or not an appeal is frivolous involves a decision as to whether, as a matter of law or fact, appellant's contentions have any likelihood of success or whether continuation of the contest is reasonable.

Wenger v. Common wealth of Pennsylvania, 107 Pa. Common wealth Ct. 20, 527 A.2d 1071 (1987). Under the circumstances of this case, an award of counsel fees to the Department under Pa. R.A.P. 2744 is warranted. Hence, we remand, on this issue alone, to the trial court for a factual determination of the amount of counsel fees and costs.

As we find no abuse of discretion by the trial court in refusal to grant Swoyer's request for continuance or in dismissal of Swoyer's Motion for Rehearing, the order of the trial court is affirmed and the case remanded for a determination of the amount of counsel fees and costs to be awarded.

SILVESTRI SILVESTRI, Senior Judge

CONCURRING AND DISSENTING OPINION
BY JUDGE PELLEGRINI
FILED: September 10, 1990

I concur in the affirmance of the trial court's denying continuance and dismissing the motion for a rehearing, but dissent as to the awarding of counsel fees because the appeal is frivolous.

For counsel fees to be awarded on appeal as to whether, as a matter of law or fact, Swoyer's contentions have no likelihood of success and continuation of the contest is unreasonable. Wenger v. Common wealth of Pennsylvania, 107 Pa. Cmwlth Ct. 20, 527 A.2d 1071 (1987).

Swoyer raises the issue that it was an abuse of discretion for the trial court not to grant a continuance for it contravenes the Supremacy Clause of Article VI, Section 2 of the United States Constitution. On that ground, Swoyer

argues that if counsel is required to appear in federal and state courts simultaneously, counsel is bound to attend the federal court matter. While I believe that this contention is erroneous, so many federal judges believe this to be true, how can it be frivolous?

More to the point, I do not believe that Pa. R.A.P. 2744 authorizes the imposition of counsel fees against a party where the substance of the matter on appeal involves conduct of his counsel rather than that party's interest. Pa. R.A.P. 2744 is not broad enough, and absent a provision in the Appellate Rules similar to that contained in Section 8355 of the Judicial code, 47 Pa. C.S. Section 8355, counsel fees cannot be awarded against the attorney.

For the foregoing reasons, I dissent.

DAN PELLEGRINI, JUDGE

APPENDIX B: RESPONDENT'S APPLICATION TO REPORT UNREPORTED OPINION

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RONALD FRANCES SWOYER, Appellant	:	
	:	NO.
	:	2062 C.D 1989
vs.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Appellee	:	

APPLICATION TO REPORT UNREPORTED OPINION

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

NOW COMES the Department of Transportation, Bureau of Driver Licensing, that, by and through its attorney, Timothy P. Wile, Esquire, respectfully applies to this Honorable Court to amend its order and memorandum opinion to the three-judge panel in this case be reported and avers the following in support thereof:

1. Appellant Swoyer's operating privilege was initially suspended by the Department for one year under the implied consent law, 75 Pa.C.S. §1547.

2. Appellant Swoyer's appeal to the Court of Common Pleas of Lehigh County, under 75 Pa.C.S. §1550, was denied by the Common Pleas Court in January 1988.

3. In December 1988 Appellant Swoyer filed a post-trial motion seeking a re-hearing or new trial of his implied consent law suspension.

4. The common pleas court granted Appellant Swoyer four continuances of a hearing on that motion before it denied a fifth continuance and dismissed the post-trial motion in October 1989.

5. Appellant Swoyer appealed the dismissal of his post-trial motion for rehearing to this Honorable Court.

6. On September 10, 1990, a three-

judge panel of this Honorable Court affirmed the decision of the Court of Common Pleas of Lehigh County and granted the Department's Application for Sanctions under Pa.R.A.P. 2744 by a memorandum opinion. A copy of that opinion is attached as Exhibit A.

7. Subsequent to this Honorable Court's unpublished decision in this case, the Pennsylvania Supreme Court denied Appellant Swoyer's petition for allowance of appeal.

8. Appellant Swoyer has pending a Petition for a Writ of Certiorari with the United States Supreme Court at Docket No. 91-124, to which the Department has filed a brief in opposition and an application for sanctions under Supreme court Rule 42.2.

9. The major issue decided in the panel's opinion is whether the Supremacy

Clause of the Federal Constitution, U.S. Const., Art. VI, cl.2, requires a Pennsylvania Court to automatically grant a party a continuance where the party's counsel has a scheduling conflict requiring counsel to appear in Federal Court. This court held that U.S.Const. Art. VI, cl. 2, does not mandate that an attorney's scheduling conflict with a Federal Court appearance requires a state trial court to grant that attorney a continuance of the state court matter. This court also ruled that Appellant's appeal was frivolous and granted the Department sanctions under Pa. R.A.P. 2744.

10. This analysis contained in Court's opinion in this case is well reasoned, sound and thoughtful. In researching this matter for the brief in opposition to Appellant Swoyer's petition

for certiorari in the United States Supreme Court, the Department has been unable to find any Pennsylvania appellate decision that sets forth the holding handed down by this court in its September 10, 1990, unreported opinion. Therefore, the holding in this case, if the opinion is published, will provide significant additional clarification in this area of the law and provide much needed guidance to both the bench and bar of this Commonwealth.

11. This Court's opinion in this case will be given added significance since it is being reviewed by the United States Supreme Court when that Court decides whether to grant or deny Swoyer's Petition for Writ of Certiorari.

12. Unless this opinion is reported, it may not be cited in any brief, argument or opinion, except that any opinion filed

in the same case may be cited as representing the law of the case. 210 Pa.Code §67.55.

WHEREFORE, the Department of Transportation, Bureau of Driver Licensing, respectfully requests that this Court's unreported opinion in Swoyer v. Department of Transportation, No. 2062 C.D. 1989, filed September 10, 1990, be designated as an opinion to be reported.

Respectfully submitted,

Timothy P. Wile
Assistant Counsel-in-Charge
Appellate Section
Attorney I.D. No. 30397

Attorney for Appellee

APPENDIX C: ORDER OF SUPREME COURT OF PENNSYLVANIA

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

May 6, 1991

Dear Counsel:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above Captioned matter:

May 2, 1991 Petition Denied.

Per Curiam.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the foregoing document upon the following person(s) by depositing same in the United States mail, regular, first-class mail, postage prepaid, addressed as follows:

This 5 day of October, 1991.

ORLOSKI & HINGA

Richard J. Orloski
Attorney for Petitioner
Attorney ID. #09857
1005 South Cedar Crest Blvd.
Allentown, Pennsylvania 18103
(215) 433-2363